RENDERED: DECEMBER 1, 2006; 2:00 P.M.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2005-CA-001752-MR

MARVIN K. HODGE — APPELLANT

v.

APPEAL FROM NELSON CIRCUIT COURT
HONORABLE CHARLES C. SIMMS, III, JUDGE
ACTION NO. 03-CR-00344

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: JOHNSON AND TAYLOR, JUDGES; BUCKINGHAM,[1] SENIOR JUDGE.

TAYLOR, JUDGE: Marvin K. Hodge appeals from a July 25, 2005, judgment of conviction and sentence of the Nelson Circuit Court, upon a jury verdict finding him guilty of one count of cultivating five (5) or more marijuana plants (Kentucky Revised Statutes (KRS) 218A.1423(2)) and one count of possession of drug paraphernalia (KRS 218A.500). We affirm.

[1] Senior Judge David C. Buckingham sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes 21.580.

On October 8, 2003, Deputy Sheriff Ed Mattingly of the Nelson County Sheriff's Department received a complaint from Hodge's neighbor, Tommy Case. Case alleged Hodge had stolen a basketball goal, storage building, porches, and central air conditioner unit from his property. Case reported to Deputy Mattingly that the basketball goal, storage building, and porches were in plain view upon Hodge's property.

Deputy Mattingly proceeded to Hodge's property and confronted him with the allegations. Hodge responded that Case had given him the basketball goal, storage building, and porches. Hodge denied having the air conditioner. Deputy Mattingly decided it would be beneficial to talk with Case and Hodge together. During the conversation, Case acknowledged he gave the basketball goal to Hodge; however, Hodge admitted to taking the storage building and porches without Case's consent. Hodge agreed to return the building and porches but continued to deny possession of the air conditioner.

Deputy Mattingly requested permission to search Hodge's premises for the air conditioner; Hodge refused. Mattingly subsequently prepared an affidavit which resulted in a search warrant being issued. Mattingly stated in the affidavit that Hodge admitted to taking the building and the porches but denied possession of the air conditioner. Upon execution of the warrant, Mattingly and other officers returned to Hodge's

property to conduct the search. The air conditioner was not located, but marijuana and drug paraphernalia were discovered in a small storage building located inside a larger building situated on the rear of Hodge's property.

Hodge was subsequently indicted by a Nelson County Grand Jury upon one count of cultivating five (5) or more marijuana plants and one count of possession of drug paraphernalia. Hodge filed a motion to suppress the evidence seized from execution of the warrant. The circuit court denied the motion. A jury ultimately convicted Hodge of the indicted offenses, and the circuit court sentenced him to five years' imprisonment. This appeal follows.

Hodge contends the circuit court erred by denying his motion to suppress evidence. Hodge alleges the search warrant was invalid because the police officer made a material omission of fact in the affidavit utilized to obtain the search warrant.

The Fourth Amendment to the United States Constitution provides that "no Warrants shall issue, but upon probable cause, supported by Oath or affirmation."[2] To establish probable cause, the affidavit for a search warrant must "*state sufficient facts to establish probable cause for the search of the property or premises.*" Guth v. Commonwealth, 29 S.W.3d 809, 811 (Ky.App. 2000)(quoting Coker v. Commonwealth, 811 S.W.2d 8, 9 (Ky.App.

[2] Section 10 of the Kentucky Constitution.

1991)). For purposes of search and seizure, "probable cause is a flexible, common-sense standard" and depends upon the totality of the circumstances in a particular case. 79 C.J.S. Searches § 62 (2006).

A party alleging that an affidavit for a search warrant omits a material fact must demonstrate that: (1) "the police omitted facts with the intent to make, or in reckless disregard of whether the omission made, the affidavit misleading," and (2) "the affidavit, as supplemented by the omitted information, would not have been sufficient to support a finding of probable cause." Guth, 29 S.W.3d at 810. Simply put, to vitiate a facially sufficient search warrant the material fact must have been omitted intentionally or with reckless disregard for the truth *and* the affidavit plus the omitted facts must not be sufficient to support a finding of probable cause. Id.

In the case *sub judice*, the affidavit merely contained a summary of the facts regarding Case's allegations that Hodge stole the basketball goal, porches, and building coupled with Hodge's admission that he took the porches and building without Case's permission. The affidavit also contained a statement that Hodge denied possession of the air conditioner. Hodge alleges that the following facts were omitted from the affidavit that: (1) Hodge informed Deputy Mattingly the mortgage holder

repossessed the air conditioner, and (2) Hodge provided the mortgage company's phone number. At the suppression hearing, Hodge testified that he relayed these two facts to Deputy Mattingly. However, Deputy Mattingly testified that Hodge stated he did not have the air conditioner and "wasn't sure" if the mortgage company had taken it. When further questioned on the issue, Deputy Mattingly testified that Hodge also said the mortgage company "had probably taken it – they had been up there." Mattingly did not testify that Hodge supplied the phone number of the mortgage company.

The issue of weight and credibility of a witness is clearly within the province of the fact-finder. Commonwealth v. Sawhill, 660 S.W.2d 3 (Ky. 1983). The circuit court, as fact-finder during the suppression hearing, chose to believe the testimony of Deputy Mattingly over the testimony of Hodge. The circuit court specifically stated in its order that "[t]his Court believes Mattingly's testimony that Hodge only informed him [Deputy Mattingly] that the air conditioner 'could' have been repossessed by the mortgage company." We cannot say the circuit court's finding – that Hodge only informed Deputy Mattingly that the air conditioner "could" have been repossessed – to be clearly erroneous.

We point out that the record is void of any evidence showing that Deputy Mattingly's omission of such fact was

intentional or in reckless disregard for the truth. Moreover, we believe the affidavit plus the omitted fact, that the mortgage company "could" have repossessed the air conditioner, still supports a finding of probable cause that the air conditioner may have been discovered on Hodge's property. Considering the totality of the circumstances presented (i.e., that Hodge admitted taking the porches and building), a common-sense approach would support a finding of probable cause even if the omitted fact had been included in the affidavit. As such, we believe the search warrant was valid and the circuit court properly denied Hodge's motion to suppress.

Hodge next contends the circuit court erred by denying his motion to suppress the evidence because execution of the search warrant was invalid as it did not specifically describe the place to be searched. Hodge contends the marijuana was discovered inside a small storage building located within a larger building on Hodge's property.[3] Hodge asserts that the storage building was leased to another individual and, thus, was subject to the "multiple unit rule." Even if we accept Hodge's assertion that the storage building was leased to another individual, his argument would fail.

[3] The small storage building where the marijuana was discovered was not the same storage building that Marvin K. Hodge admitted taking from Tommy Case's property.

It is well-established that to contest a search and seizure, "an individual must possess a legitimate expectation of privacy in the area searched or property seized." Garcia v. Commonwealth, 185 S.W.3d 658, 666 (Ky.App. 2006)(citing Rakas v. Illinois, 439 U.S. 128 (1978)). An individual has no expectation of privacy in premises he is not in possession of or has leased to another. Buchanan v. Commonwealth, 210 Ky. 364, 275 S.W. 878 (1925). Without a legitimate expectation of privacy, an individual "lack[s] standing to complain of the search's alleged illegality." Hause v. Commonwealth, 83 S.W.3d 1, 10 (Ky.App. 2001)(quoting Cormney v. Commonwealth, 943 S.W.2d 629, 631 (Ky. 1996)).

In the case *sub judice*, Hodge asserts the small storage building was leased to another individual. If the storage building was indeed leased to another individual, Hodge would have no expectation of privacy in the building. Without a legitimate expectation of privacy, Hodge has no standing to assert the illegality of the search of the storage building allegedly leased to another. See Powell v. Commonwealth, 282 S.W.2d 340 (Ky. 1955). Accordingly, the circuit court properly denied Hodge's motion to suppress the evidence seized.

Hodge's final argument is that the circuit court erred by denying his motion for a directed verdict of acquittal. Hodge specifically contends the testimony of Detective Roby

contained "[i]nconsistencies and conflicts" that were "very apparent, and as such the jury should not have given his testimony weight." For example, Hodge asserts that Detective Roby testified at trial he had never heard about the alleged lease of the storage building; but, in fact, Detective Roby was made aware of the lease at the preliminary hearing.

A motion for directed verdict is properly granted "if under the evidence as a whole, it would be clearly unreasonable for a jury to find guilt . . . ." Commonwealth v. Benham, 816 S.W.2d 186, 187 (Ky. 1991)(citation omitted). It is well-established that the weight and credibility of a witness's testimony are questions within the province of the jury. Commonwealth v. Sawhill, 660 S.W.2d 3 (Ky. 1983). Hodge's assertion regarding Detective Roby's testimony goes to weight and credibility. Hodge was entitled to bring this issue to the jury's attention. Based upon the evidence as a whole, we do not believe the circuit court erred by denying Hodge's motion for directed verdict.

For the foregoing reasons, the judgment of conviction and sentence of the Nelson Circuit Court is affirmed.

ALL CONCUR.

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